



THE COMMONWEALTH OF MASSACHUSETTS AUTO DAMAGE APPRAISER LICENSING BOARD

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GILBERT W. COX JR.
CHAIRMAN

JOSEPH COYNE
RICHARD STARBARD
WILLIAM E. JOHNSON
LYLE M. PARE

Minutes of Meeting of the Board held on January 17, 2018, Approved by the Board at the February 27, 2018, Board Meeting; Motion of Board Member Joseph Coyne and Seconded by Board Member Richard Starbard. The Motion Passed by a Vote of: 4-0, Chairman Cox Abstained.

January 17, 2018, Minutes of Board Meeting
Held at 1000 Washington Street, Boston, Massachusetts.

Members Present:

Chairman Cox
Joseph Coyne
William Johnson
Richard Starbard

Attending to the Board:

Michael D. Powers, Counsel to the Board
Steven Zavackis, Executive Secretary

Proceedings recorded by:

Peter D'Agostino of the Alliance of Automotive Service Providers of Massachusetts (AASP) (Audio/Video). Chris Gervais of MAPFRE (Audio/Video). Evangelos Papageorg of EXP Consulting (Audio/Video). Jim Steere, Hanover Insurance Company (Audio).

Call to Order:

Chairman Cox called the meeting to order. Chairman Cox reported that Board Member Lyle Pare would be unable to attend the meeting because of the snowy weather conditions and resulting commitments to his job.

Review of minutes:

The Board reviewed minutes of the Board Meeting held on December 6, 2017. The draft minutes were distributed to the Board Members just before the beginning of the meeting, and Chairman Cox called for a motion to approve the minutes. Board Member William Johnson declared that he did not have sufficient time to review the minutes and requested that they be tabled to the next Board meeting. Chairman Cox asked for a motion to table the minutes, and Board Member

Richard Starbard made the motion to table the Board minutes until the next Board meeting, the motion was seconded by Board Member Johnson. The motion passed by a vote of: 3-0 with Chairman Cox abstaining.

Report on the next Part-II examination for motor vehicle damage appraiser:

A Motor Vehicle Damage Appraiser Part II examination was scheduled for January 24, 2018, at Progressive Insurance Company's facility in Westwood.

Revised Auto Damage Appraiser Licensing Board Complaint Application to the Board changing the current language from, "I attest that the information provided is true, correct and complete to the best of my knowledge" to adding the following language, "I attest and affirm under the pains and penalties of perjury that the information provided is true, correct, and complete and based on my personal knowledge.":

Board Member Coyne opined changing the current language in the complaint application to include a declaration that the complaint is signed under the pains and penalties of perjury was appropriate in light of the fact that appraisals by licensed motor vehicle damage appraisers must be signed and sworn under the penalties of perjury as required by the Board's enabling Act [G.L. c. 26, § 8G].

Board Member Richard Starbard disagreed with the proposed language change including the declaration, "based on my personal knowledge." He explained that, often times licensed appraisers engage in conversations with third parties who provide information to them and, therefore, such conversations would not be considered based upon a person's "personal knowledge." Mr. Starbard asked Board Legal Counsel to explain why that wording was proposed to the Board.

Board Legal Counsel Michael Powers responded that conversations a complainant engaged in with other parties would be considered "based upon a person's personal knowledge" and that this type of wording is often found in the legal business, such as in civil cases when parties file motions for summary judgment. The Massachusetts Rules of Civil Procedure requires that affidavits, filed in such cases, must be based on the affiant's "personal knowledge." In addition, because the proposal is for changing the standard language in the complaint form to include a declaration that the information contained in the complaint is true and accurate and signed under the penalties of perjury, it is good form to include the language that the information contained in the complaint is based upon the complainant's "personal Knowledge."

Board Member Starbard disagreed, asserting that he did not see the need to include the statement that the facts were based upon a person's personal knowledge.

Board Member Johnson agreed and suggested that the language read, "This complaint has been prepared and sworn under the penalties of perjury." Board Member Johnson made a motion that the matter be tabled until the next meeting so that Board Member Pare could review it and provide his input. He also requested Board Legal Counsel Michael D. Powers research the issue and report to the Board at the following Board meeting. The motion was seconded by Board Member Starbard, and the motion passed by a vote of: 3-0 with Chairman Cox abstaining.

Letter from Anthony Lombardozzi requesting the Board answer various questions about insurers and their authority over appraisers writing appraisals on their behalf:

Chairman Cox read the first question that was written in Mr. Lombardozzi's letter, "Can an insurer dictate or coerce an independent licensed appraiser or licensed staff appraiser, verbally or in writing, what operations, procedures, parts and the dollar amount or hourly rate to be used to calculate the retail price of repairs when estimating damage?"

Board Member Coyne responded that the appraiser should make his own appraisal decisions and the Board should not be responding to such questions.

Board Member Johnson reflected that, the answer to the question is that an insurer cannot dictate to a licensed motor vehicle damage appraiser but in reality an insurer does direct an appraiser.

Chairman Cox then read the second question, "Can an insurer dictate or coerce an independent appraisal firm verbally or in writing, what operations, procedures, parts, prices, and the dollar amount of hourly labor rate to be used to calculate the retail price of repairs when estimating damage?" After reading the question Chairman Cox concluded that it was the same question.

Chairman Cox read the third question in the letter, "Can an owner/manager of an independent appraisal firm dictate or mandate the use of said prices to any licensed appraiser employed by or contracted by that firm?" Chairman Cox concluded that, the answer was probably yes.

Board Member Starbard responded, the appraiser makes the decision.

Chairman Cox read the fourth question, "Can an owner/manager of an independent appraisal firm request or require that a licensed appraiser, writing damage appraisals on behalf of that firm, change or rewrite his or her damage appraisal to conform to either written or verbal guidelines provided by an insurer and can the owner or manager threaten the licensed appraiser with the loss of employment for non-compliance of these mandates?"

Chairman Cox announced the real questions is: Do we, as the Board, want to answer these questions?

Board Member Johnson replied legally once an appraisal is written, it is written. The practical reality is that Massachusetts is an employee at will state, and an employee can be terminated for any reason or no reason at all. Employees must do what they are told to do.

Board Member Coyne observed, the answers are in the CMR [the Board's regulation 212 CMR 2.00 et seq.]. Board Member Johnson concurred.

Chairman Cox requested the Board Legal Counsel, Michael D. Powers, draft a letter responding to Mr. Lombardozzi, refer him to the Board's regulation for the answers to the questions he asked in

his letter, and inform him that if he feels that there is a violation of the regulation he should file a complaint. Board Member Coyne made a motion that Legal Counsel Powers draft the letter for the Chairman's signature and the motion was seconded by Board Member Richard Starbard. The motion passed by a vote of: 3-0 with Chairman Cox abstaining.

Next Board Meeting:

The Board determined that the next Board meeting would be held on Tuesday, February 27, 2018.

For discussion by the Board, submitted by Board Member William Johnson, the following question: Is it proper procedure for an insurance company appraiser to write an appraisal for an aftermarket part and, thereafter, make a note on the appraisal indicating that a "New Part" (Original Equipment Manufacturer part) from the auto manufacturer is or may be available at the same price and that the vehicle owner probably should not be charged anything extra?:

Board Member Johnson reported that it was brought to his attention that an appraiser wrote an appraisal for aftermarket parts, and in the appraisal indicated that similar Original Equipment Manufacturer (OEM) parts may be available at the same price and recommended it should be checked out.

Board Member Starbard disagreed with this type of written appraisal because it is misleading to the consumer.

Board Member Coyne asserted that this type of issue is covered by a regulation which requires the use of OEM parts based upon the amount of mileage of the motor vehicle when the vehicle has less than 20,000 miles (211 CMR 133.04 (1)(e) when the vehicle has been used no more than 20,000 miles). When a motor vehicle has under 20,000 miles OEM parts must be used and in excess of 20,000 miles, the use of aftermarket parts to repair a motor vehicle is allowed. Board Member Starbard concurred with Board Member Coyne's opinion.

Board Member Johnson interjected, an appraisal should be written either for aftermarket parts or OEM parts, not for both.

Board Member Coyne observed that sometimes an auto body shop has a deal with a manufacturer such as GM to get the same price for an OEM part as an aftermarket part.

Chairman Cox queried, is it the consensus of the Board that placing both aftermarket parts and OEM parts in an appraisal for the same damaged part would be improper?

Board Member Johnson responded, yes. An appraiser must either source an aftermarket part or an OEM part, the appraiser cannot place both in an appraisal. Board Member Johnson concluded, by doing that an appraiser would be writing a conflicting appraisal. Board Member Johnson volunteered to submit an Advisory Ruling for the subject matter. Board Member Johnson opined that the auto body and insurance industry should submit positions to the Board so that the Board could reach a common ground on such an Advisory Ruling and made a motion to table the matter. The motion was seconded by Board Member Coyne, and the motion passed by a vote of: 3-0 with Chairman Cox abstaining.

Review and vote on proposed Advisory Ruling submitted by Board Member William Johnson requiring Manufacturers recommended repair procedures must be followed when a structural part of a motor vehicle has sustained damage affecting the safe operation of the motor vehicle:

Board Member Johnson submitted the following proposed Advisory Ruling:

TO ALL CONCERNED PARTIES

Re: Advisory Ruling 2017-XXXX

The Auto Damage Appraiser Licensing Board (ADALB or Board) is authorized to oversee all motor vehicle damage appraisers in the Commonwealth of Massachusetts pursuant to M.G.L. c. 26, § 8G and 212 CMR 2.00 et seq. titled, “The Appraisal and Repair of Damaged Motor Vehicles” as promulgated by the ADALB. In relevant part M.G.L. c. 26, § 8G provides, “The board shall after notice and hearing in the manner provided in chapter thirty A adopt rules and regulations governing licenses under this section in order to promote the public welfare and safety.” In addition 212 CMR 2.01(1) provides, “Purpose and Applicability. The purpose of 212 CMR 2.00 is to promote the public welfare and safety by improving the quality and economy of the appraisal and repair of damaged motor vehicles....” Furthermore, 212 CMR 2.04(1)(e) in pertinent part reads, “If, while in the performance of his or her duties as a licensed auto damage appraiser, an appraiser recognizes that a damaged repairable vehicle has incurred damage that would impair the operational safety of the vehicle, the appraiser shall immediately notify the owner of said vehicle that the vehicle may be unsafe to drive. The licensed auto damage appraiser shall also comply with the requirements of M.G.L. c. 26, § 8G the paragraph that pertains to the removal of a vehicle's safety inspection sticker in certain situations.” Under its authority the ADALB is, *inter alia*, authorized to: issue licenses to all motor vehicle damage appraisers in the Commonwealth (licensed appraisers or appraiser) 212 CMR 2.02, regulate the conduct of motor vehicle damage appraisers in the Commonwealth 212 CMR 2.02, regulate the manner of conducting motor vehicle damage appraisals 212 CMR 2.04, and to issue Advisory Rulings pursuant to 212 CMR 2.01(3) and M.G.L. c. 30A, § 8. It is the intention of the ADALB to issue an Advisory Ruling consistent with 212 CMR 2.00 et seq. and M.G.L. c. 26, § 8G to be followed by licensed appraisers.

Pursuant to its authority, the ADALB voted by a majority vote at the Board’s meeting held on December 6, 2017, to adopt this Advisory Ruling.

ADVISORY RULING

212 CMR 2.04(1)(e) states in relevant part “[T]he appraisers representing the insurance company and the registered repair shop selected by the insured to do the repair shall attempt to agree on the estimated cost for such repairs. The registered repair shop must prepare an appraisal for the purpose of negotiation. No appraiser shall modify any published manual (*i.e.*, Motors, Mitchell or any automated appraisal system) without prior negotiation between the parties. Manufacturer warranty repair procedures, I-Car, Tec Cor and paint manufacturer procedures may also apply....”

The Auto Damage Appraiser Licensing Board has passed a motion declaring that for the purposes of reducing traffic accidents and safeguarding users of motor vehicles against unreasonable risks of accident, injury, or death, when structural damage is caused to the structural/frame component of a motor vehicle (the main structure of the vehicle and/or any component designed to provide structural integrity of the vehicle), and if the repair of a damaged part will impair the operational safety of the motor vehicle requiring the replacement of the part,¹ to ensure the safe and proper repair of a damaged motor vehicle the Manufacturer warranty repair procedures shall be followed. Components that are bolted onto a motor vehicle are not considered part of its structure or frame.

This Advisory Ruling shall be effective upon posting on the Auto Damage Appraiser Licensing Board public website. Failure to comply with this ruling could result in fines and penalties as provided by law.

For the ADALB,

Michael D. Powers, Esq.
Legal Counsel to the Board

Board Member Johnson said that he wanted to give the auto body and insurance industry the opportunity to review the proposed Advisory Ruling and provide input and recommend language so that the Board could reach a common ground with the interested parties. He made a motion to table the proposed Advisory Ruling which was seconded by Board Member Coyne. The Chairman called for a vote on the motion to table, and the motion passed by a vote of: 3-0 with Chairman Cox abstaining.

New Business:

Board Member Starbard requested that Complaint 2016-5 be placed on the agenda for the next Board meeting and Board Legal Counsel Powers replied that it would be placed on the agenda.

¹ This requirement is also contained in the Automobile Insurers Bureau of Massachusetts 2016 Massachusetts Automobile Insurance Policy, Part-7 (Collision) and Part-8 (Comprehensive).

The owner of Accurate Collision Auto Motive Center of Worcester, Adam Haddad, requested permission to speak to the Board and permission was granted by Chairman Cox.

Mr. Haddad informed the Board that he had two different issues that he would like to discuss. One involved an appraisal of a damaged motor vehicle that was at his auto body shop. The appraiser for the insurance company acknowledged that a replacement aftermarket part was damaged, but, nevertheless, the insurer requested that the motor vehicle be repaired with the damaged part. He elaborated, there was a chip in the corner of the left head-lamp of the replacement part, and the appraiser for the insurance company insisted that the damaged part be used as the replacement part. In addition, the damaged motor vehicle was a 2014 Ford Explorer and the appraiser wrote the part as a 2013 part.

Board Member Starbard said that Like Kind and Quality parts are defined as the same as the pre-damaged part and he opined that plainly writing the damaged replacement part on the appraisal would be a violation of the Board's regulation.

Board Member Coyne observed that Mr. Haddad had the option to fill-out an application for a complaint and file it with the Board.

Board Member Johnson volunteered that, a 2014 part is not the same as a part made for a 2013 motor vehicle. Mr. Johnson pointed out that, if it was a straight appraisal the customer can agree with replacing his/her damaged part with such a part.

Board Member Starbard suggested Mr. Haddad file a complaint with the Board.

A member of the audience Mr. "Lucky" Papageorg asked permission to speak and Chairman Cox granted permission. Mr. Papageorg asked why the Board did not approve the minutes of the prior Board meeting and the Chairman responded that the Board received them that morning. Mr. Papageorg asked what the Board's notification procedure was for cancelling a Board meeting and explained, that morning it began to snow and he was uncertain whether the Board would hold the meeting.

Board Member Coyne answered by stating, the Board cancels Board meetings because of inclement weather when the Governor declares a state of emergency and that is the only reason that the Board has cancelled Board meetings in the past.

Motion to Enter Executive Session:

Chairman Cox announced that the Board was about to enter an executive session, would not return to the public session, and would adjourn in the executive session. Chairman Cox then read the following statement:

The Board is about to enter the Executive session to review and discuss the background of applicants for motor vehicle damage appraiser test who have disclosed a criminal conviction on the application. The Board would also meet to review and discuss Complaints 2017-14, 2017-16, 2017-19, 2017-20, 2017-24, 2017-25, 2017-26, 2017-27,

and 2017-28 filed against motor vehicle damage appraisers licensed by the Auto Damage Appraiser Licensing Board. Such discussions during the executive session are allowed under M.G.L. c. 30A, §21(a)(1) and in accordance with the Office of the Attorney General's Open Meeting Law (OML) decisions such as *Board of Registration in Pharmacy Matter*, OML 2013-58, *Department of Public Safety Board of Appeals Matter*, OML 2013-104, and *Auto Damage Appraisers Licensing Board Matter*, OML 2016-6. Section 21(a) states "A public body may meet in executive session only for the following purposes:

(1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the session be open. If an executive session is held, such individual shall have the following rights:

- i. to be present at such executive session during deliberations which involve that individual;
- ii. to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session;
- iii. to speak on his own behalf; and
- iv. to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense.

The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

Chairman Cox concluded the statement by announcing, the licensed appraisers' attorneys have requested the matters be heard in the executive session.

Chairman Cox called for a motion to enter into the executive session which included adjourning in the executive session and Board Member Johnson made the motion and the motion was seconded by Board Member Coyne. Chairman Cox then called for a roll-call vote on the motion, and the motion passed by a roll-call vote of: 3-0 with each Board Member answering "yes" as each name was called by Chairman Cox, and Chairman Cox announced that he abstained.

Executive Session:

Complaint 2017-14:

The Board reviewed the complaint filed against the licensed appraiser and his attorney's written response to it. After a discussion about the facts alleged in the complaint, the Board determined that there were insufficient facts in the complaint to establish that the licensed appraiser did anything that would violate the Board's enabling act or regulation. The licensed appraiser appeared before the Board with his attorney, Attorney John R. Callahan, an expert in Massachusetts insurance laws, who presented a succinct summary of the facts and law to the Board.

At the conclusion of Attorney Callahan's summation, Board Member Coyne made a motion to dismiss the complaint and Board Member Johnson seconded the motion. The motion passed by a vote of: 3-0 with Chairman Cox abstaining and Board Member Pare not present during the meeting.

Complaint 2017-16:

The Board reviewed the complaint and the appraiser's representative Attorney John R. Callahan's response to it. The Board determined that the complaint did not have sufficient facts contained in it to support a violation of the Board's enabling act or regulation and by a vote of: 3-0 dismissed the complaint, with Chairman Cox abstaining. Board Member Coyne made the motion to dismiss the complaint and Board Member Johnson seconded the motion.

Complaint 2017-19:

The Board reviewed the allegations made in the complaint and determined that there were insufficient facts to support a violation of the Board's enabling act and regulation to establish that the licensed appraiser violated the law. This complaint is related to Complaint 2017-24, involves the same motor vehicle as that complaint, but was brought by a different appraiser employed by the auto body company.

During a review of the facts, Board Member Coyne noted that the damage to the motor vehicle was initially appraised at \$767.48 with a supplementary appraisal submitted by the insurance company in the amount of \$40. The total final appraisal submitted by the complainant, who was employed by the auto body shop, was \$14,756.54. Three photographs of the damage, taken during the initial appraisal by the insurance company's appraiser when the motor vehicle was appraised at its Drive-In appraisal facility, displayed minor side-swipe damage of the motor vehicle along the front bumper and license plate area with no other apparent damage.

The accused appraiser's attorney wrote a response to the complaint in which he raised an issue about the minor damage to the motor vehicle, which he submitted was probably caused by a tire of another motor vehicle brushing up against the front bumper of the damaged motor vehicle, and pointed out the great disparity between the initial appraisal by the insurance company's appraiser, for such minor damage, and the amount of the final appraisal submitted by the appraiser employed by the auto body shop.

Board Member Starbard observed that the photographs of the damaged motor vehicle displayed scuff marks on the bumper and grill of the motor vehicle.

The consensus of the Board was that, based on the documents submitted, there was no apparent reason for a tear-down of the motor vehicle, the costs submitted for tearing-down the motor vehicle, and the amount of the final appraisal that was submitted by the complainant. Based upon the documents submitted to the Board, Board Member Coyne opined that the complete tear-down of the motor vehicle prevented the insurance company from conducting a proper appraisal of the initial damage. Board Member Johnson disclosed that he had a relationship to someone involved in the complaint and recused himself.

The noted insurance law Attorney John R. Callahan appeared before the Board with the licensed appraiser and requested the Board dismiss the complaint. Attorney Callahan informed the Board that there appeared to be additional damage to the motor vehicle, provided for in the final appraisal, than the damage photographed during the initial appraisal conducted at the insurance company's Drive-In appraisal facility. The Board voted to dismiss the complaint with Board Member Coyne making the motion and Chairman Cox seconding the motion. The Board voted: 3-0 to dismiss the complaint with Board Member Johnson not voting because he recused himself.

Complaint 2017-20:

The Board reviewed the allegations of the complaint and responses made to them by the licensed appraiser's attorney. The consensus of the Board was that the complaint was deficient because it provided insufficient factual information to support the allegations raised in the complaint. The records filed with the Board disclosed that the insurance company's Drive-In appraisal facility representative informed the consumer to have the auto body shop appraiser contact the insurance company. Attorney John R. Callahan and the licensed appraiser appeared before the Board. Attorney Callahan, a renowned expert in Massachusetts insurance laws, presented a concise summary of the facts and law to the Board and requested the Board dismiss the complaint.

Board Member Coyne made a motion to dismiss the complaint, which was seconded by Board Member Johnson, and by a vote of: 3-0 the complaint was dismissed with Chairman Cox abstaining.

Complaint 2017-24:

A written response to the complaint on behalf of the licensed appraiser was filed with the Board by Attorney John R. Callahan. This complaint was directly related to Complaint 2017-19, involved the same damaged motor vehicle, but was filed against a different appraiser employed by the insurance company. Board Member Johnson disclosed that he had a relationship to someone involved in the complaint and recused himself.

The Board reviewed the allegations made in the complaint and the licensed appraiser's response to them. Board Member Coyne made a motion to dismiss the complaint which was seconded by Chairman Cox, and by a vote of: 3-0 the complaint was dismissed with Board Member Johnson not voting.

Complaint 2017-25:

The licensed appraiser and his Attorney John R. Callahan appeared before the Board. Board members asked questions of the licensed appraiser and he answered each and every one of them to the Board's satisfaction. Board Member Johnson made a motion to dismiss the complaint, the

motion was seconded by Board Member Coyne, and by a vote of: 3-0 the Board voted to dismiss the complaint with Chairman Cox abstaining.

Complaint 2017-26:

The licensed appeared before the Board with Attorney John R. Callahan, a renowned authority on motor vehicle damage appraisal laws who asserted that the licensed appraiser did not violate the Board's regulation or enabling act. When questioned by the Board, the licensed appraiser confirmed Attorney Callahan's assertions and answered every question asked by members of the Board to their satisfaction. Attorney Callahan informed the Board that, the dispute over the appraisal was in the arbitration process and the parties were awaiting the selection of the third arbitrator. Board Member Johnson made a motion to dismiss which was seconded by Board Member Coyne and the vote was: 3-0 with Chairman Cox abstaining.

Complaint 2017-27:

During the review by the Board the licensed appraiser was represented by Attorney John R. Callahan who adroitly presented the facts and legal arguments in support of dismissing the complaint. The Board voted to dismiss the complaint by a vote of: 3-1 with Board Member Johnson voting against.

Complaint 2017-28:

Attorney John R. Callahan represented the licensed appraiser during the review of the complaint. Members of the Board asked the licensed appraiser several questions and he answered all of the questions to the Board's satisfaction. Attorney Callahan informed the Board that the underlying claim was settled between the parties and Dentwizard was consulted as to the pricing on the repair. At the conclusion of the review, Attorney Callahan provided an eloquent summary of the salient facts, the applicable law, and requested the Board dismiss the complaint. Board Member Coyne made a motion to dismiss the complaint and the motion was seconded by Chairman Cox. The motion passed by a vote of: 3-0 with Board Member Johnson abstaining.

Motion to adjourn:

Board Member Johnson made a motion to adjourn which was seconded by Board Member Coyne, and the motion passed by a vote of: 3-0, with Chairman Cox abstaining.

Whereupon, the Board's business was concluded.

The form of these minutes comports with the requirements of M.G.L. c. 30A, §22(a).

List of Documents provided at the Board meeting:

- 1. Letter from Mr. Anthony Lombardozzi dated November 22, 2017, to the Board requesting answers to certain questions.**